87-122

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

LEE A. MOSCO, JR.,
Petitioner

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit ignore the intent of Congress that issues of fact, under the Federal Employers' Liability Act and the Federal Boiler Inspection Act, are to be determined by a jury, when it affirmed the trial court's granting of a directed verdict in favor of the railroad and against the injured employee under the Boiler Inspection, where there was evidence by which the jury could find that the employee had been provided with a locomotive engine which was unsafe to operate in the service to which it was put, and was in violation of federal regulations, and that this was a cause of the employee's injuries.

2. Did the United States Court of Appeals for the Fourth Circuit fail to properly administer the Federal Employers' Liability Act and the Federal Boiler Inspection Act when, contrary to the decisions of this court, it affirmed the trial court's granting of a directed verdict in favor of the railroad and against the injured employee under the Boiler Inspection, where there was evidence by which the jury could find that the employee had been provided with a locomotive engine which was unsafe to operate in the service to which it was put, and was in violation of federal regulations, and that this was a cause of the employee's injuries.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the Court of Appeals are listed in the caption. Lee A. Mosco, Jr., an individual, is a railroad employee. The Baltimore and Ohio Railroad Company, a corporation, is an interstate railroad carrier.

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OCTOBER TERM, 1987

No.

LEE A. MOSCO, JR.,
Petitioner

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, an injured railroad employee, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on April 21, 1987. Petitioner does so because that judgment deprived Petitioner of his basic and fundamental right to a trial by jury, which is part and parcel of the remedy afforded railroad workers by Congress under the Federal Employers' Liability Act, 45 U.S.C. § 51 and the Federal Boiler Inspection Act, 45 U.S.C. § 23.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 817 F.2d 1088 (4th Cir. 1987). The district court opinion affirmed by the

decision below is not reported. Relevant portions of the trial transcript, which contain the opinion of the lower court, are contained in the Appendix at pages 12a through 17a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 21, 1987. There are no Orders respecting rehearing or extensions of time within which to petition for certiorari. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106.

STATUTORY PROVISIONS INVOLVED

This case involves the deprivation by the lower courts of the Petitioner's right to a trial by jury for claims brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 and the Federal Boiler Inspection Act, 45 U.S.C. § 23.

Section 51, Title 45 of the United States Code, commonly referred to as the Federal Employers' Liability Act, provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the neg-

> ligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Section 23, Title 45 of the United States Code, commonly referred to as the Federal Boiler Inspection Act, provides as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 and 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

STATEMENT OF THE CASE

Petitioner, Lee A. Mosco, Jr., an injured railroad employee, filed his Complaint against the Respondent, The Baltimore and Ohio Railroad Company, an interstate rail carrier, in the United States District Court for the Eastern District of Pennsylvania on July 31, 1984. On October 9, 1984, this action was transferred to the United

States District Court for the District of Maryland. It was assigned to the Honorable John R. Hargrove.

A trial before a jury was begun on February 24, 1986. On February 25, 1986, the trial court granted a directed verdict, in favor of the Respondent, on Petitioner's claims under the Federal Boiler Inspection Act. On February 26, 1986, the jury returned a verdict in favor of Respondent. On February 26, 1986, a judgment was entered in favor of the Respondent and against the Petitioner.

On March 18, 1986, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit, and on March 25, 1986, he filed an Amended Notice of Appeal. The case was argued before the Court of Appeals on January 8, 1987. On April 21, 1987 the Court of Appeals affirmed the judgment of the trial court.

On August 3, 1983, Petitioner was employed by the Respondent as a locomotive engineer. Petitioner was operating a freight train called the Orange Blossom Trailer Train from the Potomac Yard in Virginia to Willmer, Delaware. At approximately 8:35 P.M., Petitioner was seated on the right-hand engineer's seat of the locomotive, four inches from his right side window. The right window was about three feet wide by two and one-half feet high. It had two panes of glass which both slid fully open from the middle. The side windows were dirty and the dirt obstructed and distorted vision through them. The locomotive cab was unbearably hot due to the outside temperature and humidity, engine heat and extremely inadequate ventilation. Employees were often forced to keep the windows open because of poor locomotive ventilation.

Petitioner's run required him to pass through the Virginia Avenue Tunnel in Washington, D.C. Although railroad employees were regularly subjected to stonings and other objects thrown at them and their train along the routes they traveled, this was a particularly dangerous

area. Juveniles and others routinely hurled objects at passing trains from embankments along the track near the tunnel.

At approximately 8:30 P.M., Petitioner approached the south end of the tunnel. He was required to proceed no faster than 10 miles per hour. His right window had been open due to the unbearable heat and the poor ventilation. As he approached this dangerous area, he slid his right window partially closed. He could not close it fully because of the heat and because at this low speed, his speed regulator was inaccurate, requiring him to judge his speed by visually observing the ground. Dirt on his window obstructed and distorted his view, and therefore he had to keep his window open 8 inches, out of the possible 36 inches, to see clearly. When Petitioner was approaching the tunnel entrance, he was struck on the right side of his head by a hard foreign object which came through the window from outside the engine.

Petitioner sustained a concussion and post-concussion syndrome with visual injury. He was disabled from his railroad employment from August 3, 1983 through April, 1985. Although he was able to return to work, his complaints continued through the date of the trial.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the court of first instance was the Federal Employers' Liability Act, 45 U.S.C., §§ 51, et seq., particularly § 56. This section provides in relevant part:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56.

REASONS FOR GRANTING THE WRIT

I. BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IGNORED THE INTENT OF CONGRESS THAT ISSUES OF FACT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT AND THE FEDERAL BOILER INSPECTION ACT ARE TO BE DETERMINED BY A JURY.

II. BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FAILED TO PROPERLY ADMINISTER THE FEDERAL EMPLOYERS' LIABILITY ACT AND THE FEDERAL BOILER INSPECTION ACT AND IN ADMINISTERING THOSE ACTS FAILED TO FOLLOW DECISIONS OF THIS COURT.

Petitioner, an injured railroad employee, was improperly denied the right to have his claims under the Federal Boiler Inspection Act determined and resolved by a jury. This Court has long recognized that "(t)he right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence." *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943); *Jacob v. City of New York*, 315, U.S. 752 (1942); *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67-8 (1943). This right is protected by the Seventh Amendment to the Constitution of the United States and is part and parcel of the remedy afforded railroad workers by Congress under the Federal Employers' Liability Act (FELA). *Bailey*, supra at 354; *Tiller*, supra at n.30. It was Congress' intent, in establishing the employees' remedies under the FELA, that a jury determine whether the railroad's conduct played any part in the employee's accident. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508-09 and n. 18 (1957). This Court has observed that to deprive an injured railroad worker "of the benefit of a jury trial . . . is to take away a goodly portion of the relief which Congress has afforded

them." *Bailey*, supra at 354, *Blair v. Baltimore & Ohio R. Co.*, 323 U.S. 600, 602 (1945).

The right to a jury trial, because it is "so fundamental and sacred to the citizen," should be jealously guarded by the courts. *Jacob*, supra at 752-53. Therefore, this Court has historically been vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of a jury determination. Likewise, this Court has effectuated the Congressional intention of securing to injured railroad workers the right to a jury trial by granting certiorari where this right has been denied. This granting of certiorari has been intended to correct instances of "improper administration of the Act to prevent its erosion by narrow and niggardly construction." *Rogers*, supra at 509-510; *Wilkerson v. McCarthy*, 336 U.S. 53, 70-73 (Douglas, J. concurring.)

The United States Court of Appeals for the Fourth Circuit, and the trial court, ignored the important principle of a right to trial by jury. Therefore, this Court is urged to grant certiorari and exercise its supervisory powers over the federal courts to correct this serious departure from the accepted and usual course of judicial proceedings under, and the administration of, the FELA and the Federal Boiler Inspection Act.

The FELA and the Federal Boiler Inspection Act are federal statutes [1] which were enacted by Congress in response "to the special needs of railroad workers who are

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[1] The Federal Boiler Inspection Act is in effect an amendment to the FELA. It, and the Federal Safety Appliances Act, are supplemental to the FELA. Violation of the Act's duty to provide safe equipment constitutes "negligence per se" and dispenses with the need by an injured employee to prove the railroad's negligence. Neither contributory negligence nor assumption of the risk is a defense to the "absolute and continuing duty" of the railroad under the Boiler Inspection Act. *Urie v. Thompson*, 337 U.S. 163, 179-190, n.30 (1949); *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, n.13 (1957).

daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 330 (1958), *rehearing denied*, 356 U.S. 978 (1958). The Acts were designed to protect employees and "to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations." *Wilkerson*, supra at 68 (Douglas, J., concurring); *Urie v. Thompson*, 337 U.S. 163, 181, n. 20 (1949). Accordingly, these statutes are, and have been, liberally interpreted to fully effectuate their remedial and humanitarian purposes. *Atchison, Topeka & Santa Fe R. Co. v. Buell*, —— U.S. ——, 94 L.Ed. 2d 563, 570-71 (1987); *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486 (1943); *Urie*, supra at 181, n. 20, n. 34.

These Acts have been held to require that only the rarest case not be sent to the jury. A directed verdict in favor of the railroad is only appropriate "when there is a complete absence of probative facts" to support a finding of liability. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946); *Myers v. Reading Co.*, 331 U.S. 477, 485 (1947). "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury." *Ellis v. Union Pacific Co.*, 329 U.S. 649, 653 (1947). The appellate court's function is exhausted when an evidentiary basis becomes apparent, even if it feels that another conclusion is more reasonable. *Lavender*, supra at 653. This evidentiary basis can be entirely circumstantial. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *Rogers*, supra at n. 17.

The Federal Boiler Inspection Act requires that locomotives, and *all* parts and appurtenances thereof, be "in proper condition and safe to operate in the service to which the same are put, that the same may be employed

in the active service of such carrier without unnecessary peril to life or limb." 45 U.S.C. § 23. It further provides that the locomotive be in compliance with regulations promulgated by administrative agencies. Violation of agency regulations also give rise to damage suits. *Urie*, supra at 191. If that standard is not met, and the failure to provide a proper and safe locomotive "played any part, even the slightest, in producing the injury or death for which damages are sought," *Rogers*, supra at 506; *Buell*, supra at n. 8; *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949), the railroad is liable to the injured employee.

In this case there was clear evidence by which the jury could have found that the railroad violated the Federal Boiler Inspection Act and that its violation was a cause of Petitioner's injuries. The evidence established that the Petitioner, a locomotive engineer, was struck in the head by a hard object, which entered the cab from outside through the right side window. Although the window was made of shatter-proof material and provided protection to the cab's occupants when closed, the evidence established that Petitioner had to leave the window open while operating the locomotive. As the United States Court of Appeals for the Fourth Circuit summarized the evidence:

> "At the time the injury occurred, Mosco was approaching the Virginia Avenue Tunnel in Washington, D.C. * * * He . . . stated that on the day of the accident, he was operating the locomotive with its right window . . . open, in order to cool and ventilate the cab of the locomotive." (Appendix 2a)

Evidence of co-workers confirmed that due to poor ventilation locomotives could not be operated during the summer [2] without opening the windows. Its summary of facts continued,

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[2] This accident occurred on August 3, 1983.

> "As he approached the Virginia Avenue Tunnel, Mosco opened the window . . . to a width of about eight inches. He testified that it was necessary for him to open the window to check his ground speed, because the window was so dirty he could not otherwise see out." (Appendix 2a)

> "Mosco testified that on the day his injury occurred, the windows of the locomotive cab were so dirty that he had to open them to see out. He also testified that unless the windows were kept open, the interior of the cab became unbearably hot and inadequately ventilated." (Appendix 6a-7a)

In addition to the absolute obligation to provide a locomotive which is "safe to operate", 45 U.S.C. § 23, 49 C.F.R. §§ 229.7, 229.45 (Appendix 19a), the railroad was required to provide a locomotive having cab windows which "provide(d) an undistorted view of the right-of-way for the crew from their normal position in the cab" and which had "proper ventilation" 49 C.F.R. § 229.11 (Appendix 19a).

There was ample evidence for the jury to find that the railroad violated the Boiler Inspection Act, and that its violation caused Petitioner's accident and injuries. The jury could have found, based on Petitioner's testimony, that the locomotive did not comply with 49 C.F.R. § 229.11. The jury could have found that the inability to see out of the side window [3] violated the continuing duty to provide an "undistorted view of the right of way." The jury could have found that the unbearably hot locomotive cab violated the duty to provide "adequate ventilation".

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[3] Foreign substances on an engine, even if caused by natural conditions, which render a locomotive, or part thereof unsafe to operate, can render a carrier liable under the Federal Boiler Inspection Act. *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481 (1943); *Calabritto v. New York, New Haven and Hartford R.R. Co.*, 287 F.2d 394 (2d Cir. 1961); *Whelan v. Penn Central Co.*, 503 F.2d 886 (2d Cir. 1974); *St. Louis Southwestern Ry. Co. v. Williams*, 307 F.2d 147 (5th Cir. 1968).

This evidence could have also supported the conclusion that the railroad violated the general obligation to provide a safe locomotive. Finally, the jury could have found that these unsafe conditions were the reason that the right side window was open and that these unsafe conditions played a part, even if only the slightest, in the foreign object entering the cab and striking the Petitioner.

The trial court, in directing a verdict against the Petitioner on his Boiler Inspection Act claims, and the United States Court of Appeals for the Fourth Circuit, in affirming that trial court action, improperly usurped the jury's role. The lower courts imposed their own conclusions of fact, made their own inferences and reached their own conclusions as to credibility. These were matters which were clearly reserved for the jury. *Myers*, supra at 485; *Ellis*, supra at 653; *Lavender*, supra at 653. Specifically, some of the questions which the jury should have been allowed to consider were: Was Mr. Mosco's testimony credible?; Was Mr. Mosco unable to see out of his right side window without opening it?; What was the extent of the window's visibility obstruction?; Why was the window obstructed?; Was the condition of the window contrary to the commands of 49 C.F.R. § 229.11?; Was the cab ventilation adequate?; What were the ventilation conditions in the cab? Who was responsible for the ventilation conditions in the cab?; Was the cab ventilation contrary to the commands of 49 C.F.R. § 229.11; Did the dirty right side window play any part, even the slightest, in Mr. Mosco's accident and injuries?; Did the inadequate ventilation play any part, even the slightest, in Mr. Mosco's accident and injuries?; Was the locomotive unsafe and did it play any part, even the slightest, in causing Mr. Mosco's accident and injuries?

These questions were answered "no" by the lower courts. But, as noted before, these questions should have never been considered by the courts as they were solely

for the jury to determine. The failure of the lower courts to permit those issues to go to the jury, where there was not a complete absence of probative facts, was improper. It deprived Petitioner of his basic and fundamental right to a trial by jury, which is both guaranteed by the Seventh Amendment to the Constitution of the United States and is part and parcel of the remedy afforded him by Congress through the Federal Employers' Liability Act and The Federal Boiler Inspection Act.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this Honorable Court grant his petition for certiorari.

Respectfully submitted,

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Dated: July —, 1987.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2037

LEE A. MOSCO, JR.,
Plaintiff-Appellant,

versus

BALTIMORE & OHIO RAILROAD,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
John R. Hargrove, District Judge—(CA 84-4228)

Argued: January 8, 1987 Decided: April 21, 1987

Before PHILLIPS AND ERVIN, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Lawrence A. Katz (Joseph A. Coffey, Jr. on brief) for appellant; Ranson J. Davis (H. Russell Smouse; Nancy

S. Allen; C. Keith Meiser; Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A. on brief) for appellee.

ERVIN, Circuit Judge:

Plaintiff Lee A. Mosco, Jr., appeals from a judgment entered in favor of defendant Baltimore & Ohio Railroad ("B & O") in this case involving claims under the Federal Boiler Inspection Act, 45 U.S.C. § 23 (1982), and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* (1982). Although we do not entirely agree with the reasoning of the district court, we affirm the judgment for the B & O for the reasons stated below.

Mosco was employed by the B & O as a locomotive engineer. He was injured when a rock, or some similar object, came through the open window of the locomotive he was operating and struck him in the head. Although the windows of the locomotive were made of shatter-proof material, they were not equipped with any protective screens, bars, grates or similar devices.

At the time the injury occurred, Mosco was approaching the Virginia Avenue Tunnel in Washington, D.C. He testified that he had been stoned by juveniles in this area on a number of occasions, and that he had reported these stoning incidents to the B & O. He further stated that on the day of the accident, he was operating the locomotive with its right window two to three inches open, in order to cool and ventilate the cab of the locomotive. As he approached the Virginia Avenue Tunnel, Mosco opened the window further to a width of about eight inches. He testified that it was necessary for him to open the window to check his ground speed, because the window was so dirty that he could not otherwise see out.

Before trial began, the B & O made a motion in limine to preclude Mosco from offering any evidence concerning the absence of screens, bars, grates or similar devices from the windows of the locomotive's cab, and to prevent

Mosco from contending that the absence of such protective devices constituted a violation of the Boiler Inspection Act. The district court granted this motion and, at the close of Mosco's case, directed a verdict for the B & O on the Boiler Inspection Act claim. Mosco's FELA claim went to the jury, and the jury returned a verdict for the B & O.

Although Mosco makes numerous assignments of error, his primary contention is that the district court erred in granting the B & O's motion in limine and in later directing a verdict for the B & O on the Boiler Inspection Act claim. In our view, the district court acted properly in granting the B & O's motions in limine and for directed verdict, although we reach this conclusion for different reasons than those relied upon by the district court.

The Boiler Inspection Act prohibits common carriers by railroad from operating any locomotive unless the "locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. . . ." 45 U.S.C. § 23. The Act also prohibits the operation of any locomotive that has not passed certain tests and inspections prescribed in the applicable rules and regulations. *Id.* The Federal Railroad Administration has promulgated regulations concerning locomotive safety standards and inspections. *See* 49 C.F.R. §§ 200 *et seq.* (1986).

The Boiler Inspection Act imposes upon carriers by railroad an absolute duty to maintain their locomotives in safe and proper condition. *Lilly v. Grand Trunk Western Railroad Co.*, 317 U.S. 481, 485 (1943). Carriers that violate the Act may be held liable to employees who are injured as a result of the violation. *See, e.g.,*

Lilly, 317 U.S. at 485; *Green v. River Terminal Railway Co.*, 763 F.2d 805, 810 (6th Cir. 1985).

In this case, the essence of Mosco's Boiler Inspection Act claim was that the locomotive in which he was injured was not safe to operate without screens, bars, grates or similar protective devices over the windows of the locomotive's cab. Mosco claimed that such protective devices were necessary to make the locomotive safe, because it was often necessary to operate the locomotive with its windows open.

We believe that the district court incorrectly apprehended the nature of the duty imposed by the Boiler Inspection Act in granting the B & O's motion in limine. The district court was of the opinion that a carrier cannot violate the Act so long as it complies with the applicable safety and inspection regulations promulgated by the Federal Railroad Administration. As the district court correctly noted, the B & O had complied with the regulation requiring safety glazing of locomotive cab windows. *See* 49 C.F.R. § 223. The district court believed that the B & O's compliance with this regulation satisfied its duty under the Boiler Inspection Act. Accordingly, the district court excluded the evidence concerning the absence of screens, bars, grates or similar protective devices from the cab windows that Mosco intended to offer to prove a violation of the Boiler Inspection Act.

We disagree with the district court's rationale for granting the B & O's motion in limine. As other courts have observed, a carrier may violate the Boiler Inspection Act in one of two ways. First, it may fail to comply with the regulations promulgated by the Federal Railroad Administration. Compliance with these regulations is not, however, the only duty imposed by the Act. The Act also imposes a broader duty on carriers to keep all the parts and appurtenances of their loco-

motives in proper condition and safe to operate without unnecessary peril to life or limb. Thus, even if a carrier complies with the regulations, it may still violate the Act if the parts or appurtenances of its locomotives are otherwise unsafe. Contrary to the district court's view, "[t]he argument that there can be no violation of the Act absent a violation of some regulation or order of the . . . Federal Railroad Administration is without merit." *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1246 (8th Cir.), *cert denied*, 106 S.Ct. 208 (1985). *Accord Whelan v. Penn Central Co.*, 503 F.2d 886, 890 (2d Cir. 1974); *St. Louis Southwestern Railway Co. v. Williams*, 397 F.2d 147, 149-51 (5th Cir. 1968); *Calabritto v. New York, New Haven & Hartford Railroad Co.*, 287 F.2d 394, 396 (2d Cir.), *cert denied*, 366 U.S. 928 (1961).

This is not to say, however, that liability under the Boiler Inspection Act may be imposed in every case in which it is alleged that a carrier's failure to install some device on a locomotive rendered the locomotive unsafe. The Act imposes on carriers only the duty to maintain the parts and appurtenances of their locomotives in safe and proper condition, and the term "parts and appurtenances" does not include every item of equipment that conceivably could be installed on a locomotive. Rather, as the Supreme Court has stated:

> Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission [now the Federal Railroad Administration], are within the [Boiler Inspection Act]. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability.

Southern Railway Co. v. Lunsford, 297 U.S. 398, 402 (1936); *see also Marshall v. Burlington Northern, Inc.*,

720 F.2d 1149, 1152 (9th Cir. 1983) (*Lunsford* interpreted "parts and appurtenances" "as encompassing '[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the [Secretary] . . .'") (emphasis deleted).

From *Lunsford*, we derive the rule that a carrier cannot be held liable under the Boiler Inspection Act for failure to install equipment on a locomotive unless the omitted equipment (1) is required by applicable federal regulations; or (2) constitutes an integral or essential part of a completed locomotive. In this case, the bars, screens, grates or similar protective devices, which Mosco claims should have been installed over the windows of the locomotive's cab, are not required by applicable federal regulations. Thus, under the rule we have stated, Mosco would have a viable claim under the Boiler Inspection Act only if the omitted protective devices constitute an integral or essential part of a completed locomotive. In our opinion, they do not. *Cf. Lunsford*, 297 U.S. at 399-402 (experimental safety braking device was not integral or essential part of a completed locomotive).

Because the B & O's failure to install protective devices over the windows of the locomotive in which Mosco was injured did not amount to a failure to maintain the parts and appurtenances of the locomotive in safe and proper condition under the Boiler Inspection Act, we believe that the district court correctly excluded evidence concerning the absence of such protective devices as irrelevant. Mosco contends, however, that even if the exclusion of this evidence was proper, the district court nonetheless erred in directing a verdict for the B & O on the Boiler Inspection Act claim. We disagree.

Mosco testified that on the day his injury occurred, the windows of the locomotive's cab were so dirty that he had to open them to see out. He also testified that unless

the windows were kept open, the interior of the cab became unbearably hot and inadequately ventilated. Mosco contends that this evidence was sufficient to withstand the B & O's motion for directed verdict, because the dirtiness of the windows and the inadequate ventilation violated federal regulations promulgated under the Boiler Inspection Act. The pertinent regulations provide that "[c]ab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab" and "[t]he cab shall be provided with proper ventilation. . . ." 49 C.F.R. § 229.119 (b) and (d).

We find Mosco's arguments unpersuasive. There is no suggestion that the cab windows would have provided inadequate visibility if they had been clean. Mosco testified that on the day he was injured, he inspected the locomotive before beginning work but did not clean the windows. He further indicated that on some occasions, he did clean the windows if they were extremely dirty. Thus, it appeared from Mosco's own testimony that any impaired visibility resulting from dirt on the windows was due to his own failure to clean the windows, and not to any failure of the B & O to maintain the parts and appurtenances of the locomotive in safe and proper condition as required by the Boiler Inspection Act.

Mosco's argument concerning inadequate ventilation of the locomotive's cab is similarly without merit. Mosco's testimony indicated that ventilation in the cab was adequate if the windows were left open. There was, however, as he points out, no way to prevent objects from entering the open windows of the cab. We fail to see how this state of affairs violates the requirement that carriers provide their locomotive cabs with adequate ventilation. In our view, Mosco's argument on this point is merely a restatement of his claim that the cab windows should have been equipped with protective devices. For the reasons discussed above, this claim does not consti-

tute a viable cause of action under the Boiler Inspection Act.

Because the district court properly excluded evidence concerning the absence of bars, grates, screens or similar protective devices from the windows of the locomotive's cab, the B & O was entitled to a directed verdict on Mosco's Boiler Inspection Act claim. The evidence of dirty windows and purportedly inadequate ventilation, which was admitted, was not substantial enough to support a verdict in favor of Mosco on the Boiler Inspection Act claim. Because reasonable jurors could not have returned a verdict for Mosco, the district court properly directed a verdict for the B & O on this claim. *See, e.g., Gairola v. Commonwealth of Virginia Department of General Services*, 753 F.2d 1281, 1285 (4th Cir. 1985) (test for directed verdict is whether there can be only one conclusion as to verdict that reasonable jurors could reach; unless there is substantial evidence upon which jury could properly return verdict for nonmoving party, motion for directed verdict must be granted).

Although Mosco had no viable Boiler Inspection Act claim based on the absence of protective devices from the windows of the locomotive's cab, it is possible that he might have stated a meritorious FELA claim based on the same facts. As the Supreme Court has indicated, devices or equipment that do not fall within the coverage of the Boiler Inspection Act are not therefore excluded from the usual rules of liability. *Lunsford*, 297 U.S. at 402. If the jury had found that the B & O was negligent in failing to install protective devices over the cab windows, it could have returned a verdict for Mosco based on breach of the B & O's duty of reasonable care under the FELA.

Mosco, however, never offered any evidence concerning the absence of protective devices from the cab windows to prove breach of the B & O's duty of care under the

FELA. In response to our questioning at oral argument, Mosco's counsel stated that he believed that the district court's ruling on the motion in limine had precluded him from introducing this evidence for any reason, including proving negligence of the B & O under the FELA. We note, however, that the B & O's motion in limine was directed only to the exclusion of evidence concerning the absence of protective devices for purposes of Mosco's Boiler Inspection Act claim. Mosco never asked the district court whether its ruling on the motion in limine extended to his FELA claim as well, and he never made a proffer concerning the absence of protective devices to prove a FELA violation. It was not until oral argument before this court that Mosco first made the claim that the district court had improperly excluded evidence concerning the absence of protective devices from the cab windows for purposes of his FELA claim.

Under these circumstances, we find no reversible error in the district court's grant of the motion in limine. It appears to us that Mosco simply failed to ascertain the scope of the district court's ruling and thereafter failed to offer evidence that might have enabled him to prevail on a negligence theory under the FELA. Mosco's failure to bring the error he now asserts to the attention of the trial court precludes us from granting him relief on this ground, since any error that was committed below was not plain error.

Mosco's remaining assignments of error require little discussion. Mosco's primary claim under the FELA was that the B & O had breached its duty to provide him a safe place to work by failing to take precautions against the activities of the rock-throwing juveniles who, according to Mosco, congregated at the Virginia Avenue Tunnel. The district court correctly instructed the jury that the B & O had a nondelegable duty under the FELA to provide Mosco a safe place to work, even when Mosco's duties required him to go onto property owned by a third

person, such as the property surrounding the Virginia Avenue Tunnel. *See Cazad v. Chesapeake & Ohio Railway Co.*, 622 F.2d 72, 75 (4th Cir. 1980). The district court further instructed the jury that a carrier may be held liable under the FELA if a dangerous condition on a third person's property causes injury to an employee of the carrier, so long as the dangerous condition was foreseeable to the carrier.

In our opinion, these instructions adequately informed the jury of the duty imposed on the B & O by the FELA. Mosco, however, contends that the district court erred in failing to instruct the jury that the B & O had a duty to inspect the premises surrounding the Virginia Avenue Tunnel for the purpose of discovering the juveniles who, according to Mosco, customarily stoned passing trains. In cases in which property defects on premises owned by a third person have caused injury to a railroad employee, we have held that the railroad has a duty to inspect the premises and protect its employees from possible danger. *See, e.g., Cazad,* 622 F.2d at 75. However, Mosco has cited no authority, and we have found none, holding that the FELA imposes a duty on railroad employers to inspect premises owned by a third person for the purpose of detecting the intentional criminal activity of trespassers that may occur there. We are unwilling to hold that the B & O had such a duty in this case, and, accordingly, we conclude that the district court did not err in declining to give the jury an instruction to that effect.

Mosco's final argument is that the district court comsions prejudicial error in questioning him on two occasions during the trial. On the first occasion, the district court questioned Mosco about a statement he had given to a claims agent for the B & O after his injury. This interrogation, which elicited nothing more than the same answers that Mosco had previously given on cross-examination, was not prejudicial to Mosco.

On the second occasion, the district court questioned Mosco about the renewal of his driver's license as it related to his claim of impaired vision resulting from the head injury he had suffered. Mosco previously had testified that his driver's license had not become due for renewal for a period of two and one-half years, although, as the district court noted, applicable state law requires renewal of driver's licenses every two years. Because Mosco's testimony on this point was confusing and likely erroneous, the district court acted properly in questioning him to obtain clarification. *See, e.g., United States v. Parodi*, 703 F.2d 768, 775 (4th Cir. 1983) (district court has duty to see that facts are properly developed at trial).

For the reasons stated in this opinion, the judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Docket No.: HAR-84-4228

LEE A. MOSCO, JR.,
Plaintiff,

—VS—

BALTIMORE & OHIO RAILROAD,
Defendant.

Baltimore, Maryland
February 25, 1986

VOLUME II
TRANSCRIPT OF PROCEEDINGS

BEFORE THE HON. JOHN R. HARGROVE, J.U.S.D.C.

TRANSCRIPT ORDERED BY:
LAWRENCE A. KATZ, ESQ.

APPEARANCES:

For the Plaintiff:	LAWRENCE A. KATZ, ESQ.
For the Defendant:	RANSOM DAVIS, ESQ.
Processed By:	GAIL PRESTON

• • • •

[136] MR. KATZ: Your Honor, we obviously have not had an opportunity to specifically respond to any of this motion either, and we too, —

THE COURT: Well, it is very rare that you get that opportunity at the end of your case. You usually go right on to the next part.

MR. KATZ: Your Honor, I will attempt to lay out our general memorandum of law on this item. We note the series of cases on page 7 of our memorandum that point out as in most law, that in granting a nonsuit, Your Honor has to give us every single benefit of the doubt. In the FELA cases, these cases are more stringent.

THE COURT: Well, they are more stringent in some areas, but negligence is negligence.

MR. KATZ: That is true.

THE COURT: And you still have to meet the burden of negligence. Now, they have some stringent aspects of it certainly. But the threshold of it is you have to show that the proximate cause of the accident was an act of the B & O Railroad, whether it was because the place in which he was working had something to do with it, or whatever. Or that they had [137] something to do, —I think the issue here is whether or not they had sufficient notice that somebody might, —there is a lot of ifs, —that somebody might be hit with a rock, providing the engineer goes through there and opens his window. And I think these are all the ifs you have in this particular case.

I am not suggesting anything one way or another, but this is what we are dealing with here. I don't think there is any evidence of anything on the locomotive itself which causes injury. At least, —well, we don't know.

We don't know, and if you don't know, that's no evidence. We don't know, —is it just as easy to—if you went to surmise or make an educated guess as Mr. Mosco, —he could have bumped his head, couldn't he?

That is just as probable isn't it, as something being thrown?

MR. KATZ: No.

THE COURT: Why not? From the testimony in this case?

MR. KATZ: Because from the testimony in this case, he saw a blur of the object coming in from the outside into the engine and then immediately felt the impact.

* * * *

[138] MR. KATZ: Your Honor, the first reading of the Boiler Inspection Act, —

THE COURT: Well, there is just no evidence in that is it? I haven't seen any.

MR. KATZ: It was adduced during Mr. Mosco's testimony that in fact, the window itself had to remain open for him to properly perform his job, because of the distorting effect of the dirt on the window.

THE COURT: Well, was that the B & O Railroad's fault or his fault, because he didn't clean the window?

[139] MR. KATZ: Well, there is an engineering department and there is an equipment department.

THE COURT: Well, my recollection of the evidence was that he said he didn't have time to do it. He didn't fault anybody. He said he didn't have time. I guess you can infer from that that it was one of his responsibilities. He said he cleaned off the front windows and not the side.

I am not suggesting a whole lot in that but, the question is, whether or not that's—you see, the safety act implied more than just dirty windows. It goes to a, — the dirty windows did not cause this accident.

In most of the safety act provisions, something on the locomotive, parts or appurentant caused the accident or played a very prominent part in it. But that is not what played a prominent part in this. The stone played the most prominent part, or whatever it was. Everybody is calling it a stone, you have me calling—nobody knows what it was. Whatever it was played the pertinent part.

So there is a real serious question and maybe the jury, —I don't know, maybe the jury, —But on the safety act, you have an additional burden. You have to show that a part or appurtenant of this [140] locomotive was the cause of—had something to do with this.

MR. KATZ: Your Honor, it is my understanding of the law is that our burden is to show that that part and appurtenance played a part even in the slightest, in the happening, —

THE COURT: Yes, but what part are you talking about?

MR. KATZ: Well, certainly under the facts that are on the record at this time. If Mr. Mosco, under the operating conditions in which he was operating, had to leave the window open in order to properly operate, — that you could properly find that the need to remove whatever minimal protection was provided by the railroad was created by an unsafe condition.

THE COURT: Oh, that is stretching it an awful lot. That is stretching it so far down the line Mr. Katz, that it almost breaks. I don't think the act, —I don't think the Courts will bend the act to that great extent. You are bending it way out of proportion.

I think if you look at that act, the sole purpose of that act was that if something on the train, in the locomotive breaks, falls apart, which causes [141] injury, —for example, you get a lot of cases where the brakes jam and the people in the vehicle rush forward and strike their heads on, you know.

We have had some strange situations, but none of them that we have to take eight or nine but ifs to get there. And I think you need a lot of but ifs, to get there, which makes it so unreasonable that I think it stretches the act too far.

No, I think you are going to have to show more than that. I think under the act itself, that safety act, you are going to have to show that it was something on the

part or appurtenant, which is really what the act says, that caused him to be injured.

And the window didn't cause him to be injured. The fact that the window was open, perhaps was the cause of something coming through, but that didn't cause the injury. Whatever hit him caused the injury. And that had nothing to do with any part or appurtenants on the train. It is the act of a third party or third thing or an unknown depends on how the jury perceives it.

No, I don't have any doubt in my mind. There is no evidence at all of this act. And even if you talk about all the other things which I think you attempted to talk about, you still wouldn't meet this [142] act, woul meet the burden under this act. Because it gives you sort of an absolute liability. And when there is absolute liability, you have got to show clearly that it was a part or appurtenant of the thing which caused the injury. And that is what it does.

No, I will have to grant the motion on that second phase on the safety act.

MR. KATZ: If it please Your Honor, I except—

THE COURT: Well, you always have an exception anyway. I grant the motion.

All right, now on the other.

* * * *

[133] THE COURT: All right, any exception. You can come right up.

(Bench Conference)

MR. KATZ: Your Honor, first I take a general exception to the Court's charge on points 12 through 16. They are the issues already raised under the Boiler Inspection Act.

[134] THE COURT: All right, well, I don't know if that is an exception. That just didn't get in the case.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action File No. HAR-84-4228

LEE A. MOSCO, JR.,
Plaintiff

vs.

BALTIMORE & OHIO RAILROAD,
Defendant

JUDGMENT

This action came on for trial before the Court and a jury, Honorable John Hargrove, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged that judgment is hereby entered in favor of Defendant against Plaintiff, dated this 27th day of February, 1986.

JOSEPH A. HAAS
Clerk

/s/ [Illegible]
by BELINDA ARRINGTON
Deputy Clerk

UNITED STATES CODE

Title 45; Section 23

§ 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659.

CODE OF FEDERAL REGULATIONS

Chapter II—Federal Railroad Administration

Title 49—Transportation

§ 229.7 Prohibited acts.

(a) The Locomotive Inspection Act (45 U.S.C. 22-34) makes it unlawful for any carrier to use or permit to be used on its line any locomotive unless the entire locomotive and its appurtenances—

(1) Are in proper condition and safe to operate in the service to which they are put, without unnecessary peril to life or limb; and

(2) Have been inspected and tested as required by this part.

(b) A carrier is subject to a penalty, as provided in Appendix B, if it fails to comply with any provision of this part or of the Locomotive Inspection Act.

§ 229.11 *Cabs, Floors, & Passageways*

"(b) Cabs windows of the lead locomotive shall provide *an undistorted view of the right-of-way* for the crew from their normal position in the cab. (See also, Safety Glazing Standards, 49 C.F.R. Part 223, 44 FR 77348, December 31, 1979). (d) The cab shall be provided with *proper ventilation* and with a heating arrangement that maintains a temperature of at least 50 degrees Fahrenheit 6 inches above the center of each seat in the cab. * * *" (emphasis added).

§ 229.45 *General Condition*

"All systems and components on a locomotive should be free of conditions that endanger the safety of the crew, locomotive or train. * * *